

JANUARY 29. 1795.

ANS.—ROBERT M'INTOSH,

PET.—MRS ANN MARIA BENNET.

F. Frazer, Agent.

S. Clerk.

ANSWERS

FOR

ROBERT M'INTOSH, Musician in Edinburgh;

TO THE

PETITION of Mrs Ann Maria Bennet, of Naffau-Street, London; and John B. Williamson, designed, late of the Theatre Royal, Edinburgh.

ON advising the above petition, your Lordships, of this date, "ordained the same to be seen and answered, both upon the competency and the merits. The answers to be in the boxes upon the twenty ninth day of January current, under an amand of forty shillings Sterling."

In compliance with your Lordships appointment, the respondent shall proceed to offer what occurs to him on both points, although

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although he will here take the liberty of remarking, that if the circumstances of the case, and the proceedings in the inferior court, had been brought fully into view, he humbly thinks it would have been unnecessary to trouble your Lordships with any answer on the *merits*.

In the *first* place, with regard to the competency, the respondent has only to refer your Lordships to the acts of Parliament 1663, cap. 9. and the 20th Geo. II. cap. 43 §. 38.

The first of these acts is as follows: "Our sovereign lord and estates of Parliament, considering the *manifold prejudices and troubles* arising to diverse of his Majesty's lieges, in pursuing of matters of *small importance*, by the too frequent granting of *advocations* from *inferior* judges: Therefore, our said Sovereign Lord, with advice and consent of the saids estates, discharges the Lords of Session from giving and granting letters of advocacy, of *any actions* intended, or to be intended, before whatsoever inferior judicatories, which may competently, by the laws of the kingdom, be decided by the saids inferior judges, before whom the said action is or shall be intended, for sums of money within *two hundred merks*, or for any other cause, whereunto, by the laws of the Kingdom, the saids inferior judges are expressly appointed judges."

The act of the 20th of his late Majesty, is as follows: "And be it further enacted, that the act of Parliament made in Scotland in the year 1663, entitled *an act about the discharging of advocations for sums within 200 merks*, shall, from and after the said 25th day of March, be, and the same is hereby extended to the case of all advocations, *in causes* not exceeding the value of twelve pounds Sterling."

From the conception of those acts, and their meaning and import, it is abundantly clear, that it is the *principal sum alone*, that regulates the competency of advocacy; and although the conclusion in the libel for a random sum of expences, when joined with the sum sued for, amounts to upwards of 12l. Sterling, that can not render the advocacy competent. As little can the expences found due enter into consideration. The very object of complaining by advocacy, is to set aside those expences, and they cannot be taken into view as making any part of the sum sued for, or liquidated, till the decree is extracted, and the amount charged for. If either the expences concluded for in
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the libel, or found due, were to be allowed to enter into consideration, the clear object of the acts of Parliament would be evaded in every instance. By *protracting* the litigation in the inferior court, the most trifling cause would easily be made to amount to a sum beyond 12l. Sterling. In this way, there never would be a suspension; and the litigant, instead of censure or punishment for his improper litigation, would be rewarded, by evading to find caution, which your Lordships know is always found in suspensions; and, in this way, the *salutary* enactments of two very *anxious* acts of Parliament, would be good for nothing.

The case referred to in the petition, 11th February 1761, Marquis of Lothian *contra* Oliver and Fair, is not in point. In that case the precise conclusion of the libel was *uncertain*, and what induced your Lordships to pass the bill in that case, was, as expressed in the judgment; "as the value of the dog and gun was *uncertain*, and might *exceed* 12l. Sterling."

But there was a case determined the 26th July 1750, Buchanan *against* Ure, observed by Kilkerran, which seems more in point: "There being an *advocation sought*, of a cause depending before the Sheriff of Stirling, betwixt George Buchanan, tenant in Dunbroch, and James Ure, tenant in Haltown of Balgair, *for a less sum* than 12l.; the Lord Ordinary had remitted *with an instruction*; but the matter being brought by bills and answers before the Lords, they were of opinion, this cause could neither be *advocated*, nor any *instruction* given therein, but remitted to the Sheriff to proceed as he should see cause." From this action, depending "*for a less sum*" than 12l. it is apprehended, that it was the *principal* sum alone which was understood to regulate the *competency*.

In the statement in the petition, it is said, that the conclusions of the sums were for "2l. 16s. as the balance resting for his performances at Glasgow, and expences of travelling; *2do*, for 6l. 6s. as salary due for the period he performed, after he was dismissed from the theatre; *3tio*, for 12l. 12s. being salary due for the remainder of the season.

The summons, no doubt, *narrates*, that there was due to the pursuer, "by John B. Williamson, and Mrs Bennet, mother of Mrs Eisten, who had a lease of said Theatre, and who was liable along with said Mr Williamson, for payment of his account

“ count, the sum of 9l. 2s. Sterling, conform to a particular account herewith produced: That the said pursuer, being desirous to have a settlement of his account with the said defenders; and on making such a request, he was, upon the day of May current, discharged from further attending at the Theatre Royal, by the said Mrs Bennet, defender, and that without any just cause whatever, although he was engaged for the whole season, by the said Mr Williamson and Mrs Bennet: That the said defenders *would be further due* to the said Robert M'Intosh, pursuer, the sum of 1l. 11s. 6d. Sterling, weekly; and for each week from and after the 28th day of March current, so long as the house should continue open for the season, and for which he was so engaged as aforesaid.” The summons concluded for payment of the foresaid sum of 9l. 2s. with interest from the date of the libel; and for payment of 1l. 11s. 6d. Sterling, weekly, “ ay, and while the Theatre Royal shall continue for the season, the terms of payment *being always first come and bygone.*”

Although the conclusion for 1l. 11s. 6d. Sterling, weekly, while the Theatre continued open, was *thrown* into the libel, it is sufficiently evident, that the proper conclusion was for no more than 9l. 2s. and no *execution* could have gone out for a greater sum, nor have been exacted at the time, although the defenders had allowed decree in absence to go out against them. Accordingly, the Sheriff only pronounced decree for 9l. 2s. and the only question before your Lordships, being with regard to the Sheriff's decerniture, which is below 12l. it must be clear, that it is incompetent, in the *shape* of advocacy, to complain of that judgment.

But if any doubt should be entertained as to the allowing the last conclusion of the libel to enter into consideration, the petitioners are *personally* barred from insisting on that head. For although, as has been mentioned, no more than 9l. 2s. was due when the action was raised, by the petitioners protracting the litigation to a most enormous length, there had several months elapsed, and the respondent, in order to save the trouble and expence of a *new* action, suggested, that the Sheriff ought to give an opinion on the point, how far the petitioners were liable for 1l. 11s. 6d. Sterling, weekly, after the respondent's dismissal, as the terms of payment were now come and bygone. In answer, however,

however, it was said for the now petitioners, "The present application must at once appear to the Sheriff *equally absurd and unfounded*, when it was considered, that the libel was founded on a *particular account*, relative to which the process *had been litigated*, and a decree, accordingly, on that account, given. It was not either *competent* or proper for the pursuer to bring forward a *new* article by way of an amendment, to his libel, as it was well known, that after *litisecontestation*, no such amendment could be made; nor was it ever allowed, otherwise there would be no end of litigation." And it was further said, "this present demand was a matter of after thought, brought forward to take an advantage of the defenders, in absence, and not founded in law, nor (in the circumstances of the case) in justice; and, conscious thereof, the pursuer *departed from it*." Accordingly, the application of the respondent was refused; and, therefore, when your Lordships see these petitioners thus contending and arguing, that the *narrative*, in the summons, for the salary to *become due*, should not be taken into consideration, and should be no part of the cause; and when the Sheriff did not take it into consideration, you will assuredly not allow them to depart from what they insisted on, and will not listen to them, when they now insist to have it taken into consideration. Their own arguments, in the petition, also *bar* them. They say, "that it would be equally contrary to the principles of law, as to equity, that *one party* should stand in any Court, in a more favourable situation than *the other*."

Petition p. 2.

But if your Lordships shall over-rule the objection which has been discussed, there occurs here another objection to the trying the question in the shape of an advocacy, which, with great deference, cannot be over-ruled.

Mr Erskine, B. 4. tit. 2. §. 39. after mentioning that the old form of bringing judgments under review, was by *appeal*, remarks that, posterior to the act 1487, cap. 105. "the old form of appeals fell gradually into disuse, and at last gave way to the present method of redress, by advocacy, suspension, and reduction. The *two last are the only remedies* received by our law after decree." In the present case, the decree is extracted, and it cannot be set aside in any other way but by *suspension*.

Without departing from the two objections in point of form, which here occur, the respondent shall proceed to consider the ar-

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gument on the merits, and he hopes he will be able to shew, that the petition ought to be refused on that ground.

The grounds and conclusions of the action have been already brought into view ; but it is necessary to attend to the nature of the defence which was set up by the petitioners ; as it is not brought fully into view in the petition, and it will also be proper to take a somewhat more particular view of the proceedings, than is given by the petitioners.

Separate defences were given in for Mrs Bennet and Mr Williamson. The defences for the former, bore, that " the pursuer, " on account of *great misconduct*, and a *mutinous* disposition in the " pursuer, whereby he endeavoured to cause the whole band belonging to the Theatre Royal *desert their duty*, or impose terms " upon Mr Williamson, the other defender, (who was the acting " manager) that were exorbitant and unreasonable ; for these " reasons, after tendering to the pursuer, in the presence of witnesses, *every penny he could demand*, he was discharged from the " Theatre." It was said, these facts will be substantiated by clear proof, and a reference was made to the defence for Mr Williamson, for whom it was stated, " the defender had the misfortune to engage this pursuer to perform in the band of music at " *the Theatre*, at a fixed salary per week ; but he soon proved himself unworthy of that employment, as he not only behaved " improperly himself, but he also instigated others of the band " to *mutiny* and *desertion* of their service."

This *mutiny* was explained to be a demand for an additional allowance, claimed by the band, on account of their being required to go for a fortnight with Mrs Billington to Glasgow, when the Theatre here continued open ; and, this demand is said to have been complied with by Mr Williamson, excepting as to their maintenance on the road ; " but, after their return, the pursuer " instigated the whole to insist upon payment of their *travelling charges* ; and, with this view, he, upon the 12th April last, " with his own hand, wrote out, and sent to the defender, the " *threatening* letter produced with the defences, in which he concludes, by requesting that the defender would comply with " their demands, to avoid further trouble. The defender could " view this in no other light, than as a *refusal* to perform on the " *first play night* after the audience should be assembled in the " Theatre." After going into foreign matter, it is farther said, " Accordingly,

" Accordingly, next day, the defender, in due form, sent Mr
 " Mountford the prompter, who offered the pursuer what *was*
 " *then due*, and required his receipt *in full*; and, at the same
 " time, intimated to the pursuer, that he would no longer be re-
 " ceived as a performer at the Theatre. Notwithstanding of
 " this formal dismissal, at the close of the week, the pursuer
 " persisted in attending in the orchestra as usual, though repeat-
 " edly told, both by the leader of the band, and the defender
 " himself, that he was no longer engaged, and that he would
 " not be paid for his attendance. The pursuer stated he was en-
 " gaged for the *whole* season; this was peremptorily denied:
 " Engagements for the whole season were *always* reduced into
 " *writing*, and bear a penalty for breach of performance, and are
 " executed in due form. Agreements with the band are held
 " *optional* ones; as a proof, Mr Frazer, one of the band, quitted
 " the Theatre in the middle of the season, and was not consider-
 " ed as bound to stay till any *specific* or *nominal* termination there-
 " of."

Answers were given in, bearing, that although a great deal of
abuse had been thrown out by Mr Williamson, the pursuer would
 not trouble the Sheriff with any thing on that subject, but con-
 fine himself to *facts*. " In the *1st* place, he denied that he was
 " the instigator, or the first mover in the business alluded to.
 " When Mr Williamson *selected* a part of the band whom
 " he wished to accompany the actors to Glasgow, Mr Thom-
 " son, one of the band, represented, that he for one could
 " not go, and leave other business here, unless Mr Williamson
 " would make up *his losses*. In this also the pursuer, and the o-
 " ther persons selected, concurred. The propriety of the request
 " seemed to have weight with Mr Williamson; and he desired
 " the band to make up an *estimate* of their losses, and he would
 " consider it. An estimate was accordingly given in, and Mr
 " Williamson, after *advising* with Mrs Bennet, desired the band
 " to wait upon him, when the matter would be considered. At
 " this meeting, Mr Mountford, the *prompter*, was present, and Mr
 " Williamson addressed the band, telling them, he could by no
 " means agree to the demand made, but proposed to double the
 " weekly salary they received in Edinburgh, and to pay all *rea-*
 " *sonable* expences, going to and coming from Glasgow. To this
 " proposal all the band agreed." " In consequence of this a-
 " greement,

"greement, each of the parties so engaged got 12s. 6d. to purchase tickets in the fly, and part expences to Glasgow, and the first week of the performance they received the full salary agreed on; of the second week they only received 10l. to account, of which the pursuer, as his proportion thereof, received 1l. 8s. 6d. On this account, therefore, there rested to the pursuer the sum of 2l. 16s. and there rested, on his dismission from the Theatre, in respect of the agreement abovementioned, the farther sum of 6l. 6s. It was true, that on a Saturday evening, Mr Mountford came to the pursuer, and tendered him a certain sum, on his subscribing a receipt prepared for the purpose, which bore to be in full of all demands; but as the money offered was far short of all demands, and as it appeared to be offered by way of *concussion*, the pursuer, as well as the others concerned, refused to adhibite their subscription thereto, and on this account they received no money, *EVEN* their *ordinary allowances* for the time they officiated in Edinburgh, after their arrival from Glasgow, conform to their original agreement. The defenders said that the engagements of the individuals of the band were always reduced into writing. The pursuer *perils the cause* upon a proof of the fact."

From the *admission* of the defenders, that that the pursuer was engaged to perform in the band of music, *at the Theatre*:—That he and others of the band agreed with the pursuer, for an *additional* salary, to go to Glasgow, where the pursuer performed, and received part of that salary; and that when the performance at Glasgow was over, he was *admitted* into, and performed in the band in the Theatre here, on the usual terms, without any fault found, it is submitted that there was sufficient ground for deciding the question. But the Sheriff was pleased to allow a proof, and after many delays, occasioned by the petitioners dilatory proceedings, and opening up a circumduction which the respondent consented to, after it was 6 months closed, that no *handle* might be made for want of evidence, the proof *annexed* to the petition was adduced. This proof not only failed to establish the pointed charges and averments which the petitioners had made, but *disproved* all of them, and the sheriff decerned for 9l. 2s. together with 1l. 10s. of expences, (which was not the *one-half* of the expences incurred) and the expence of extract.

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In supporting the Sheriff's judgment, and those of the Lords Alva and Henderland, now brought under review, it is only necessary for the respondents to call your Lordships attention to the *averments* of the petitioners, and to the proof."

In the first place, it was said, that the pursuer was dismissed "on account of great *misconduct*, and a *mutinous* disposition where-
"by he endeavoured to cause the whole band belonging to the
"Theatre Royal *desert their duty*."

Extract, p. 11.

This was no slight charge against a person at the respondent's time of life, and with a numerous family to support. On perusing the proof from beginning to end, there is not a vestige of evidence to support this charge of *misconduct* or *mutiny*. The petitioners admitting the respondent as a performer into their band in the Theatre, after this alledged *delinquency*, shews that they themselves considered that his conduct was not improper, and that he was no delinquent.

With regard to the supposed *mutinous* conduct of the subscriber's to the letter inserted in the petition, and the mutiny of the respondent, as one of them, it is an abuse of language to give their conduct such an *epithet*, and the interpretation attempted to be put on that letter is the most extravagant.

Petition, p. 3.

As has been mentioned, when the petitioners selected a part of the Edinburgh band, to accompany Mrs Billington to Glasgow, they stated to Mr Williamson their *just pretensions* to an additional allowance on account of the additional expence, and their loss of other employment in town; and Mr Williamson, *satisfied* of the justice thereof, accordingly went into the measure, after consulting and advising with Mrs Bennet. Proof, p. 1, let. A, B, p. 2, let. F, p. 5, let. C, D.

These *mutineers* were also admitted into their *corp*, as is established by the evidence, and continued *undischarged*, till the *second saturday* after the band returned from Glasgow; and, surely, *so rigid disciplinarians* as the petitioners, would not have allowed one of them to remain at their *posts*, if they had been guilty of *mutiny*; or if even they had been guilty of mutiny, their re-admission into employment was a forgiveness of the offence.

Proof, p. 6. F.

Again, with regard to the letter founded on, it as little can enter into consideration, as it also appears, from the evidence of Mountford the *prompter*, above alluded to, that the respondent only performed at the Theatre, *a few nights* after he notified to him his

— p. 6. F.

C

dismissal,

dismissal, which is *now* ascribed to that letter, and the Sherriff has not decerned for payment of any more than payment for the time which the respondent performed. That letter, if of an improper nature, can only come into view when the respondent shall insist for damages, on account of his improper dismissal for the remainder of his engagement for the season ; but that is not the question now before your Lordships.

With regard, however, even as to this letter, since so much has been said about it, the respondent cannot, by silently passing it over, allow that there is any thing like *mutiny* or impropriety in it, unless the demanding payment of a just debt, and what the respondent and his brethren could not afford to ly out of, shall be held to be *mutinous*.

The letter is :

“ SIR—The gentlemen of the Band, who went to Glasgow,
“ take this opportunity of informing you, that, *agreeable to their*
“ *engagement*, and in consequence of their *particular agreement*
“ with you, they request that the *balance due* them may be paid
“ without delay, in order to prevent farther trouble. We are,
“ *respectfully*, yours,” &c.

If there is any *presumption* in this letter, it may perhaps be in the exhibitors in the orchestra calling themselves gentlemen. But this is the well known *etiquette* of the *buskin*, and will be fully excused by the petitioners, as it adds the more to that *respect* which the letter gives them. So far from the letter being in any way disrespectful, it is quite the contrary. It refers to the agreement made in going to Glasgow, and *respectfully* requests the balance which was then several weeks due, in order to prevent farther trouble. This *farther trouble* may, as the petitioners choose, be interpreted into a *prosecution* for payment, or farther application by letter. Either of which methods of application the respondent and his brethren were well entitled to follow, considering the modes of payment which for some time had been followed at the Theatre ; and to call this application for wages due, *mutinous*, or a *combination* that was *illegal*, as the petitioners, in another place, term it, is an abuse of words.

The interpretation also attempted to be put upon this letter by the defenders, will never go down with your Lordships. They
say,

say, " they could view this in no other light than as a refusal to
 " *perform on the first play night*, after the audience should be as-
 " sembled in the Theatre. " If even the orchestra had put this piece
 of theatrical diligence in *execution*, to enforce payment of what
 was refused by their very respectful application, it does not ap-
 pear that there would have been any thing very blameable in
 their conduct. Any disappointment of the public would, in such
 a case, have justly been ascribed to the petitioners, for not fulfil-
 ling their engagement. But the letter, as must be obvious, has
 no such meaning or import; and the conduct of the respondent
 and his brethren shews they had no such intention. Mountford the
 prompter, depones, " That *on the close of the same week*, on which he Proof. p. 6. C.
 " was shewn the letter, so far as he recollects, he was sent by Mr
 " Williamson to the pursuer with his week's salary, and which the
 " deponent offered to the pursuer, and at the same time, as desired
 " by Mr Williamson, intimated to the pursuer, that they had no far-
 " ther occasion for his services. " Here your Lordships see the re-
 spondent and his brethren faithful at their posts, and no vestige of
 mutiny or desertion among them, although they had not then re-
 ceived their pay, and not even any assurance that they were to receive
 it; and if there was any impropriety, it was on the part of Mr
 Williamson, who returned no answer, but *insultingly* caused his
 prompter make offer of *one week's* pay, when there was a much
 greater sum due; and this week's pay was, by his special instruc- Defences
 tions to his prompter, not to be given, unless a discharge of *all*
demands was granted.

But, farther, the whole of the pretence that the respondent
 was discharged, on account of the letter of 12th April, is an *af-
 ter thought* and rather a bare faced specimen of *stage trick*.

Mrs Bennet had resolved to dismiss the respondent before even
 this letter was written. Mountford, after deponing to his offer-
 ing the respondent his weeks salary; and intimating, that they
 had no farther use for his services, " depones, That this was
 " done by order of Mrs Bennet, who, after Mrs Billington's de-
 " parture, *wished to lessen their number, as she did not chuse to retain*
 " *so expensive a band thereafter*. That when Mrs Bennet returned Proof p. 6 D & G.
 " from Glasgow, the deponent thinks he heard her express *her*
 " *displeasure* at Mr Williamson's not having discharged the pur-
 " suer and others of the band *sooner*, as she had sent notice *from*
 " *Glasgow*, by one of the actresses, *for him to do so*;" and the
 fact

fact which is above noticed, of the respondent's continuing to perform after returning from Glasgow, without any exception being taken, confirms this statement.

Petition, p. 14. It remains only to take notice, on this head, of an observation made by the petitioners, relative to the respondent, signing the letter for himself and his brethern. It is said, "it will not be *surprising*, that the managers should be anxious to get rid of "persons who could be guilty of an offence of *such magnitude*." It has already been shewn, that the real reason for wishing to get quit of the respondent, was altogether unconnected with the *merits* or *demerits* of the letter, or with the *impropriety* of the subscriptions thereto; and your Lordships cannot, for a moment, listen to the affected tone of guilt and offence which is here enlarged on by these petitioners, when their own *duplicity* of conduct has been so clearly detected; and who now wish to excuse that conduct on a ground which did not, and could not at the time occur to them, and is clearly an afterthought. It perhaps was not altogether regular in the respondent to sign for his brother, but being desired to do so, and his brother having found no fault, it ill becomes the petitioners to declaim on the *magnitude* of the offence; and your Lordships will not hear animadversions of the kind from the quarter they now come; more especially, as they have no connection with the merits of the dispute now before the Court.

In the *second* place, it was alledged against the respondent, that in going to Glasgow "he imposed terms that were exorbitant "and unreasonable."

In answer, it would be sufficient to observe, that the terms, after due deliberation and consultation between the petitioners, were thought reasonable and were agreed to: And also, that after the *trip* to Glasgow was over, the respondent and his brethern were admitted into their situation in the Theatre, without the least grudge or any disapprobation of their conduct. Indeed, if the terms had appeared extravagant, or if they really had been so, the petitioners would not have lost so much sight of their own interest as have agreed to them. They would have applied to the rest of the band who they left in Edinburgh, to *perform* when Mrs Billington was at Glasgow; and if their terms had been more reasonable, they would have allowed the respondent and his brethern to continue in Edinburgh. This would have been.

been more to their liking, and much more to their advantage than going to Glasgow.

But the terms were by no means extravagant, as it is well known the winter and spring season, when the town is full of company, is the *harvest* for the musician; while, in the summer and autumn, he has very seldom occasion to unpocket his *rosin* or draw his *bow*. In the winter and spring, the employment at private dances and other places of merriment, is as great an object, and as beneficial as attending the Theatre; and private dances being so contrived as to be on the nights the Theatre is shut, the musicians of the Theatre are employed at those dances. To propose, therefore, that the respondent and his brethren should go to Glasgow, where they were unacquainted, and could get no private employment on the same terms they performed in Edinburgh, was most unreasonable, and the petitioners, satisfied thereof, did not insist upon it. It was, indeed, *singularly* absurd to insist, that the respondent and his brethren, who are admitted in the libel, only to have been engaged *at the Theatre*, should be obliged, without any consideration, to follow the petitioners as often as they chose, to the Glasgow Theatre or else where. A person in the situation of the respondent, with a family in Edinburgh, and who has other employments in teaching and dancing, would never engage at the Theatre on such terms as the petitioners pretend; they with the same propriety might argue, that the band of music of the Theatre, was bound to attend the petitioners at Perth, Aberdeen and Newcastle; a proposition which is so extravagant, that it confutes itself; and, upon the whole, on this head, it must appear, that the terms which were proposed and agreed to for the short period of *a fortnight*, were extremely moderate.

The *third* allegation was, that there was tendered "to the respondent, in presence of witnesses, *every penny* he could demand, and he was discharged from the Theatre, as would be substantiated by *clear proof*."

This allegation is also unsupported, and is *disproved*. Mountford depones, "He was sent by Mr Williamson to the pursuer, with *his week's salary*, and which the deponent offered to the pursuer."

Proof, p. 6. C.
and D.

In the *4th* place, it was said, "Engagements for the whole season are always reduced into *writing*, and bear a *penalty* for
D "breach

"breach of performance, and is executed in due form. Agreements with the band are held optional ones—as a proof, Mr Frazer, one of the band, quitted the Theatre in the middle of the season, and was not considered as bound to stay till any specific or nominal termination thereof."

- This allegation is, in like manner, unsupported by the proof.
- proof, p. 1. B. John Barnard "Depones, That he has performed in the band of music at the Edinburgh Theatre for some years past:" "That the deponent was never under *written* articles, for any time in the Theatre; and, although he performed at Edinburgh, he did not consider himself *obliged to go to Glasgow*, unless he pleased." William Napier "Depones, That he is under written articles to Mr Williamson, for *the season*: That, by his engagement, he did not *consider himself bound to go to Glasgow, until the Edinburgh season was finished*: That the deponent was always engaged for the season, *verbally*, and he never was under written articles *at any foregoing period*; and it is the general practice, that performers in the band are engaged for the season." John Thomson depones, "That he played in the band of music at the Edinburgh Theatre, under different managers, for about *seven* years: That he always found the practice at engaging in the band, to be, that the person engaged continues in the band during the season or term that *the Theatre* is kept open, for the winter and spring season: That he never was engaged *by writ*, but always *verbally*; which, he believes, is the general practice, though he understands there have been some written engagements; and, in particular, he heard William Napier and his brother, were under written engagements to the defenders: That it is the deponent's opinion, the managers could not procure a respectable band, unless they engaged them for the season. Depones, That last season, he was asked by Mr Williamson, to accompany the actors to Glasgow: That the deponent did *not go*, as he did not consider himself bound to go to Glasgow by his engagement."

From those depositions it is clearly established, that the engagements were always *verbal*, and not by *writ*, as *asserted* by the petitioners; and although it appears that they entered into a written engagement with William Napier and his brother, for the purpose of supporting, in some degree, their rash averments, it is submitted that those *ex post facto* agreements are infinitely more
against

against the petitioners than if they had allowed their averments to be *negatived* by the proof.

Again, with regard to the dismissal of some of the band, during the season, or in former seasons, that will as little aid the petitioners. There has been no *discussion* of the point. And it appears, from the proof, that those who went away changed their situation for the better, and went away by *consent* of the petitioners. John Barnard, depones, " That Thomas Frazer and James Miller
" left the band in the course of last season, having got employ-
" ment in some regiments; Frazer having now *better pay*, and he
" supposes Miller has *the same*. That the deponent's brother has
" also left the band, but this was *in consequence of Mrs Bennet's*
" *wishing him to do so*." William Napier depones, " That he
" knows James Miller and Thomas Frazer left the band, at what
" the deponent calls the end of the winter season, which is gene-
" rally in the end of April or beginning of May, and Miller and
" Frazer have now better pay. That Richard Barnard also left
" the band about the same time, and he told the band, *Mrs Ben-*
" *net had given him his leave or discharge, as she found it necessary to*
" *reduce the band*." The evidence of Barnard also shews, that the
reason for these performers leaving the theatre, as well as for
the petitioner's dismissing the respondent, was, that " Mrs Ben-
" net, after Mrs Billington's departure, wished to *to lessen their num-*
" *ber*, as she did not chuse to retain so expensive a band thereaf-
" ter."

Proof, p. 2.

— p. 3. F.

— p. 6 D.

In opposition to all the train of evidence which has been brought under view of your Lordships, to which the petitioners have found it adviseable to make only *general references*, they have set up the evidence of Mountford the *prompter*, who depones " he
" has always been engaged at the Edinburgh Theatre by the sea-
" son; and he always considered his engagement as comprehend-
" ing both Edinburgh and Glasgow Theatres, without any addi-
" tional salary, whenever the manager ordered him, excepting be-
" ing paid *for his carriage*."

Petition, p. 13.

Proof, p. 6. G.

It must be obvious, that the petitioners are equally unfortunate in their reference to the evidence of this witness, as to that of the other witnesses who have been adduced. He depones that his engagements at the Theatre were by the season, which contradicts the averment of the petitioners, that engagements of that nature were not for the season. To be enabled to perform his
part

part well, an exhibiter in the orchestra must not only attend during the public performance, but he must also attend during the rehearsal, as well as the prompter; and therefore the *presumption* is, that his engagement is for the *season*, as well as those of the prompter. With regard to the *understanding* of the prompter, that his engagement "comprehended both Edinburgh and Glasgow theatres," such understanding is of no consequence. The profession of a prompter is very different from that of a musician, and he is very differently paid. A prompter, it is *believed*, has very little employment excepting in the Theatre; and it is better for him to submit to inconvenience and even some imposition, than remain in Edinburgh while the Theatre is shut. It would be better for him to be at the expence of transporting himself to Glasgow, Aberdeen, or to Newcastle, than be altogether idle. Whereas the musician has employment even when the Theatre is shut, and has no occasion to submit to leave Edinburgh, unless he receive an adequate consideration on that account. But even the prompter *admits*, that he demanded and received the expence of his *carriage* from Edinburgh to Glasgow, which is entirely subversive of the petitioners argument, that *no additional allowance* ought to be made in the case of the performers *emigrating* from Edinburgh to Glasgow, or other foreign parts, and requesting Edinburgh musicians to attend them.

Petition, p. 15.

In the *last* place, the petitioners contend, that there is an *overcharge* in the account of the bill, "for eating and drinking on the road," and which is said *never* to be allowed to any of the performers, for this reason, "that it does not form an article of additional expence." It would be a sufficient answer to the objection, to observe, that the *reason* assigned for not making any allowance, is most erroneous. The expence of a dinner to one who has a family in Edinburgh, makes little odds, whether *one* of the family is present or absent; and no person can eat or drink at so cheap a rate when *travelling*, as when he is in his own *house*. The charge for eating and drinking on going to, and returning from Glasgow, which is no more than 10s. must appear exceedingly moderate, and the references made to the proof by the petitioners, are, in this instance, as well as in every other, against them. John Barnard depones, "Mr Williamson agreed to give double the salary, and to pay *their expences*: depones, "That it was not specified whether the expences before mentioned

Proof, p. 1. B.
and p. 2. A.

tioned, was to include *all expences*, but the deponent understood "it meant *all reasonable expences on the road*." William Napier depones, "That the agreement made by Mr Williamson with the band of music that went to Glasgow in March last, with the company, was, that they were to receive double the salary they got in Edinburgh, *and all reasonable expences on the road* ; and it was upon the *faith* of this agreement, that the deponent went to Glasgow, as it happened to be the *throngest* time of the year, and the deponent was obliged to give up *several other engagements* by going there." Thus also Mountford the prompter depones, "That he knows the pursuer and the rest of the band of music who went with the actors to Glasgow, in March last, were to receive double the salary they got while acting in Edinburgh, besides all *reasonable charges of travelling*." And although, in the passage referred to by the petitioners, he depones, "That what he understood by reasonable charges, was the expence of the carriage on the road, and not *eating and drinking* ;" he afterwards depones, "That he heard Mr Williamson say, that the band behoved to *eat and drink* on the road, as if they were at home, but that they behoved *not to drink too much wine by the way*, and this leads the deponent to think, that eating and drinking *was agreed on*." This inference of the *prompter* is obviously a *just one*. If Mr Williamson had not considered himself the paymaster, he would not have concerned himself with what they *eat* or *drank*.

Proof, p. 2. F.

— p. 5. C.

— p. 6. A.

— p. 7. B.

Without detaining your Lordships longer, or offering any *recapitulation*, the respondent submits, that the judgements brought under review are well founded, and that the petition falls to be refused, both on the *competency* and the *merits*.

In respect whereof, &c.

JOHN HAGART.

[illegible]